From: Gloria-Small Moran
To: Rafael Casanova; Gary Moore; Robert Werner
Subject: Fw: Work Takeover - FYI
Date: 04/05/2011 10:43 AM

Gloria Moran
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----- Forwarded by Gloria-Small Moran/R6/USEPA/US on 04/05/2011 10:43 AM -----

From: "Richard Bergner" <rbergner@rfblaw.net>
To: Gloria-Small Moran/R6/USEPA/US@EPA
Cc: "Quinn O'Connell, Jr." <quinn@qlawdc.com>, "Halasz, Stephen \(Austin,TX-US\)" <SHalasz@trcsolutions.com>
Date: 04/01/2011 04:12 PM
Subject: Work Takeover

Gloria:

Pending my receipt of the official work takeover letter, I want to address on National Oil Recovery Corporation's ("Norco") behalf significant procedural issues before responding substantively to the work takeover.

It goes without saying that Norco disputes the proposed work takeover.

Based on my review of the e-mail copy of the work takeover letter forwarded to me by Mr. Halasz and the relevant provisions of the Removal Order and the RI/FS Order, it is Norco's position that it has the right to invoke the dispute resolution provisions of both Orders, not just the Removal Order, as you have advised.

The dispute resolution provisions of the RI/FS Order cover "[a]ny disputes concerning activities . . . under this Order . . . ." The EPA's decision to take over the remaining work under the RI/FS Order and the actions to be taken and demands made are clearly "activities" for which the dispute resolution provisions are applicable.

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The fact that paragraph 76 of the Removal Order expressly provides for the dispute resolution provisions being applicable to a work takeover under that Order should not be viewed as precluding the dispute resolution provisions of paragraphs 65 of the RI/FS Order being applicable to the RI/FS work takeover. These two Orders are separate and distinct agreements. Although paragraph 102 of the RI/FS Order does not expressly provide for application of the dispute resolution provisions to the work takeover, that does not mitigate against the interpretation that the dispute resolution provisions of paragraph 65 are to be applied to a work takeover. I would agree with your interpretation of the RI/FS Order if paragraph 102 expressly precluded the application of the dispute resolution provision of paragraph 65 to a work takeover, but it does not so state and to infer it does, results in an unreasonable interpretation of paragraph 102 primarily due to the harshness of a work takeover.

It would be implausible and a clear violation of Norco's rights for the EPA to argue on the one hand that it is taking over the work under the RI/FS Order, but leaving Norco without an appeal remedy of this most onerous Order. Moreover, your position would lead to an unworkable bifurcation of the remaining work to be done under both Orders, with Norco and TRC performing the remaining work under the Removal Order and the EPA's new contractor performing the remaining work under the RI/FS Order and Norco still being responsible for the quality of the work and the cost.

Under the work takeover letter the EPA advised Norco that the EPA will be presenting "immediately" the letters of credit for the two Orders. Also, the EPA has demanded that it have access to all of the data gathered by Norco in the performance of both Orders and to provide all site information prepared, obtained or gathered by Norco and Norco contractors related to the RI/FS Order.

Finally, the EPA has advised Norco that it has decided to lift the suspension of the listing of the Falcon Refinery on the NPL and to list it on the final NPL.
In order to afford Norco full due process with respect to its appeal under the dispute resolution provisions of both Orders, I request a confirmation from you that the activities to be taken and the demands made by the EPA of Norco in the work takeover letter be stayed until such time as there has been a final adjudication in connection with the dispute resolution objections that will be taken by Norco. Not to stay these activities pending the appeal, particularly in view of the fact there is no imminent danger to health and the environment at the Falcon Refinery site, would deny Norco its rights in respect of the dispute resolution provisions. With respect to the encashment of the letters of credit and the listing in the final NPL pending the dispute resolution appeal are activities that would be irreversible to Norco. Stated differently, the EPA would be unable to put the "genie back in the bottle," particularly for these two activities.

In summary, it is Norco's position that it is entitled to invoke the dispute resolution provisions of both the Removal and RI/FS Orders and that the activities to be taken and demands made under the work takeover, in light of there being no imminent danger to health or the environment, be stayed and held in abeyance until such time as Norco's appeal of the work takeover has been finally

adjudicated.

Thank you for your consideration.

Richard F. Bergner